

No. 48873-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

CARLOS AVALOS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 15-1-00429-8

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Avalos contends that he did not receive a fair trial because, he alleges, a State's witness, when testifying at trial, improperly opined about the nature of Avalos's intent as it pertains the charge of first degree assault. In response, the State contends that Avalos misapprehends the true substance and nature of the witness's testimony and that Avalos should not be permitted to raise this claim on appeal because he did not preserve it with an objection in the trial court.
 - a) Avalos's appeal should be denied under RAP 2.5(a).
 - b) Contrary to Avalos's assertions raised for the first time on appeal, Officer DeMars did not express an opinion on Avalos's guilt.
- 2) Avalos contends that his trial counsel was ineffective for failing to object to Officer DeMars's testimony about shanks. In response, the State contends that Officer DeMars's testimony was not improper but that even it was objectionable, Avalos's trial counsel had a legitimate reason not to object and that, in any event, Avalos has not, and cannot, show prejudice based on his counsel's performance.
- 3) The State is not seeking appeal costs.

B. FACTS AND STATEMENT OF THE CASE

On or about September 28, 2015, corrections officers transported the defendant, Carlos Avalos, from the Washington Corrections Center (WCC) in Shelton, Washington, to the Mason County Superior Court for a court hearing. RP 60, 112, 141. After court, the corrections officers then transported Avalos back to WCC. RP 115-16, 141. Upon arriving at

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WCC, Corrections Officer Richard Squire opened the back door of the transport van and attempted to help Avalos exit the van. RP 111, 115-16, 145. When Officer Squire reached up to assist Avalos, Avalos lunged forward and stabbed Officer Squire in the face with an improvised weapon, or “shank,” as it is known in the prison system. RP 49, 115-16, 129, 130, 145; Ex. 24, 33.

When Avalos stabbed Officer Squire, the shank punctured Officer Squire’s skin and hit the bone about a half-inch below Officer Squire’s eye. RP 106-07, 119, 130; Ex. 6. If the shank would have hit Officer Squire’s eye, it likely would have caused permanent blindness in that eye. RP 107. After the first strike with the shank, Avalos attempted repeatedly to stab Officer Squire, but the sharpened shank caused no further serious injury because the sharpened point of the shank bent when the first strike impacted with Officer Squire’s cheekbone. RP 76, 108-09, 116, 129; Ex 23.

Based on this attack, the State charged Avalos with one count of assault in the first degree and with one of count of assault in the second degree. CP 69-70, 71. After a jury trial, the jury returned guilty verdicts for both counts. CP 23-24. At sentencing, the trial court found that the second degree assault conviction merged with the first degree assault

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conviction; therefore, the trial court sentenced Avalos on the first degree assault conviction but not for the second degree assault conviction. RP 303.

C. ARGUMENT

- 1) Avalos contends that he did not receive a fair trial because, he alleges, a State's witness, when testifying at trial, improperly opined about the nature of Avalos's intent as it pertains the charge of first degree assault. In response, the State contends that Avalos misapprehends the true substance and nature of the witness's testimony and that Avalos should not be permitted to raise this claim on appeal because he did not preserve it with an objection in the trial court.

- a) Avalos's appeal should be denied under RAP 2.5(a).

The State called ten witnesses to testify at trial. RP 41, 66, 104, 111, 140, 154, 156, 160, 166, 168. One of the State's ten witnesses was Steven DeMars, who is the chief investigator at WCC. RP 41. Officer DeMars testified and provided background information in regards to the prison system, to include the process for transporting inmates to and from court and other general matters. RP 41-51. Within this context, Officer DeMars testified generically that some inmates in the Department of Corrections sometimes make improvised weapons, called "shanks," because conventional weapons are otherwise generally unavailable to

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prisoners. RP 49-50. Within this context, Officer DeMars said in passing that “[s]hanks are obviously intended to inflict great bodily harm.” RP 50.

Avalos did not object to this testimony in the trial court. RP 50. However, for the first time on appeal, Avalos now contends that this testimony infringed his constitutional right to a fair trial. Br. of Appellant at 6. RAP 2.5(a) provides that reviewing courts may refuse to consider any claim of error that appellant did not first raise in the trial court. However, RAP 2.5(a)(3) provides an exception where the error is a “manifest error affecting a constitutional right.”

Here, Avalos contends that he is entitled to the exception provided by RAP 2.5(a)(3) because, he asserts, “DeMars offered an explicit opinion on an ultimate and disputed issue of fact -- whether Avalos committed the assault with an intent to inflict great bodily harm.” Br. of Appellant at 10. But in actual fact, Officer DeMars never mentioned anything about Avalos’s intent; instead, Officer DeMars’s testimony on this subject was about shanks and not about Avalos. RP 50.

To benefit from the exception provided by RAP 2.5(a)(3), Avalos must make “a plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (internal quotations marks and

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citations omitted). Here, Avalos has identified no consequences, practical or otherwise; instead, Avalos merely concludes, without explanation, that “[g]iven Avalos’[s] denials, a plausible showing has been made that the improper opinion impacted the jury’s verdict at trial.” Br. of Appellant at 10.

Additionally, Avalos bases his contention on this point on his misapprehension of Officer DeMars’s actual testimony. Avalos asserts that “DeMars offered an explicit opinion on an ultimate and disputed issue of fact – whether Avalos committed the assault with an intent to inflict great bodily harm.” Br. of Appellant at 10. But Officer DeMars’s testimony was general and generic and was limited to a description of shanks in the prison system. RP 49-51. Officer DeMars did not offer any opinion at all about what Avalos intended when Avalos attempted to stab Officer Squire in the eye. *Id.*

Avalos contends that “[i]n the context of improper opinions, this requires ‘an explicit or almost explicit witness statement on an ultimate issue of fact.’” Br. of Appellant at 10, quoting *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (further citations omitted). The full context of the quoted language from *Kirkman* appears in the original source as follows:

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Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (internal citation omitted). Here, Officer DeMars gave no statement at all about whether he believed the accusing victim. RP 41-65. Nor did Officer DeMars give any opinion, directly or inferentially, about Avalos’s intent when Avalos attempted to stab Officer Squire in the eye with a shank. *Id.*

In closing (on this point), appellate courts generally will not permit a party to raise an issue for the first time on appeal if the trial court could have corrected the error at trial with a curative instruction or the striking of testimony, or both, had the error been raised at trial. *Kirkland* at 935. Here, if the contested testimony of Officer DeMars was error, the trial court could have easily cured any such error had Avalos raised an objection. “Failure to object deprives the trial court of this opportunity to prevent or cure the error.” *Id.* Thus, Avalos should not be permitted to raise this claim for the first time on appeal.

- b) Contrary to Avalos's assertions raised for the first time on appeal, Officer DeMars did not express an opinion on Avalos's guilt.

In his opening statement in the argument section of his appeal brief, Avalos contends that his "right to a fair trial was compromised beyond repair when the jury heard testimony from lead corrections center investigator Steven DeMars that he believed Avalos committed the assault with intent to inflict great bodily harm." Br. of Appellant at 5. Avalos then asserts that:

This Court should find that Investigator DeMars – by testifying that he believed Avalos' [sic] "obviously intended to inflict great bodily harm" by using a shank during the assault – provided an improper opinion on Avalos' guilt, thereby denying him a fair trial.

Br. of Appellant at 6 (citation to quoted language omitted in original). But Avalos takes this quoted language out of context and omits the word "shanks" from DeMars's actual statement, which is that "[s]hanks are obviously intended to inflict great bodily harm." RP 50.

Nowhere in his testimony does Officer DeMars give any opinion at all about what he believed Avalos's intent to have been when Avalos attempted to stab Officer Squire in the eye with a shank. Of course, one may extrapolate and reason that if "[s]hanks are obviously intended to inflict great bodily harm[.]" RP 50, then perhaps Avalos intended to

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inflict great bodily harm when he attempted to stab Officer Squire in the eye with a shank. But this is not the argument that Avalos makes; instead, he erroneously asserts that Officer DeMars testified about his belief of Avalos's intent. Br. of Appellant at 6. But there was no such testimony. RP 41-65.

Still more, it should be fairly obvious that when an attacker foregoes the use of bare hands and instead attacks his or her victim with an instrument capable of causing great bodily harm, then one may infer that the attacker may have intended to inflict great bodily harm. But, by way of argument, not every instrument that is capable of inflicting great bodily harm is necessarily intended by its manufacturer to be a weapon. Arguably, a gun could be used to hammer nails, and brass knuckles could be used grind nuts or to break ice, while seemingly harmless things, such as a toothbrush or a newspaper, could be used as deadly weapons. RP 50. Thus, Officer DeMars's testimony that "[s]hanks are obviously intended to inflict great bodily harm" says nothing at all about the nature of Avalos's specific intent when Avalos stabbed Officer Squire with a shank. RP 50.

Thus, Officer DeMars's testimony was useful to the jury because it helped the jury to understand the nature of shanks, to explain their existence in the prison system, and to explain their intended, weaponized

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uses (and to inferentially distinguish these uses from other possible uses, which arguably could include use as a tattoo instrument, an etching tool, or any other imaginable use). In this context, Officer DeMars did not venture to express any opinion at all about the nature of Avalos's specific intent when Avalos stabbed Officer Squire with a shank. RP 41-65.

Avalos contends that his intent when assaulting Officer Squire was the only contested issue in the case. Br. of Appellant at 8, 10. It is axiomatic, however, that the defendant is presumed innocent until proven guilty and that each element of the charged offense must be proved beyond a reasonable doubt. Here, Officer DeMars was the State's first witness out of a list of ten witnesses. RP i, 50. It was not until after the State had rested at trial that Avalos then took the stand and denied that he intended to inflict great bodily harm, while admitting every other element of the charge of first degree assault. RP 181-205. Therefore, it was an easy call for the prosecutor to make when he surmised during closing argument that Avalos's intent was "probably going to be the most heavily contested element" in the trial. Br. of Appellant at 8, quoting RP 267.

The prosecutor made no mention of DeMars's testimony during closing argument. RP 262-74, 280-83. Because Officer DeMars's testimony left to the jury the question of whether Avalos specifically

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intended to inflict great bodily harm, his brief testimony regarding shanks did not diminish Avalos's right to a fair trial. *See, e.g., State v. Toennis*, 52 Wn. App. 176, 185, 758 P.2d 539, *review denied*, 111 Wn.2d 1026 (1988) (testimony in child abuse cases that particular behavior or injuries were consistent with abuse not impermissible opinion on guilt because such testimony still leaves to the jury the question of whether the abuse was caused by the defendant).

Here, rather than testify about Avalos's guilt, Officer DeMars testified about his own knowledge of shanks, based on his experience gained from years of employment in the prison system. RP 49-51. This type of opinion testimony is admissible when, as here, the witness has a strong factual basis for the opinion and when, as here, the opinion does not include an explicit statement on an ultimate issue of fact. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

- 2) Avalos contends that his trial counsel was ineffective for failing to object to Officer DeMars's testimony about shanks. In response, the State contends that Officer DeMars's testimony was not improper but that even it was objectionable, Avalos's trial counsel had a legitimate reason not to object and that, in any event, Avalos has not, and cannot, show prejudice based on his counsel's performance.

Ineffective assistance of counsel is a two-pronged test that requires

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the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. To demonstrate prejudice, Avalos must show that but for the deficient performance, if any, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

To support his contention that his attorney was ineffective for failing to object to Officer DeMars's testimony, Avalos argues as follows:

But there is no possible strategic reason for permitting clearly improper opinion testimony that lead investigator DeMars believed Avalos had "obviously" committed the assault with the intent to "inflict great bodily harm." 2 RP 50.

Br. of Appellant at 14. As argued throughout the State's brief, the State contends that Avalos misapprehends Officer DeMars's actual testimony. As argued throughout the State's brief, Officer DeMars never even mentioned Avalos when explaining shanks to the jury. RP 49-51. Still more, Officer DeMars never uttered one word about his belief one way or

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the other about the nature of Avalos's intentions when Avalos assaulted Officer Squire. RP 41-65.

The context of Officer DeMars's statement shows that it was not a comment on Avalos's guilt but was, instead, an explanation of the nature of shanks in the prison system. RP 49-51. As such, the testimony was properly admissible. *See, e.g., City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

But even if the testimony was objectionable, Avalos had little to gain from an objection and risked highlighting the testimony or inviting further elaboration of the foundational testimony had he objected. It should be fairly obvious to the average juror that one who manufactures a dangerous weapon intends it to be a dangerous weapon. But irrespective of the intent of the typical inmate who manufactures a shank, Officer DeMars's testimony said nothing about whether Avalos intended to inflict great bodily harm when he stabbed Officer Squire. RP 49-51. Officer DeMars's testimony left this question for the jury to decide. *Id.* Therefore, Avalos had nothing to gain from an objection.

After the accumulation of the total testimony and evidence presented at trial, Officer DeMars's testimony about shanks became insignificant in the context of the total trial, but if Avalos would have

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objected to this testimony, he would have brought attention to it. And, he may have forced the prosecutor to elicit further testimony in order to elaborate on the foundation for the testimony, giving it more weight. Therefore, Avalos's counsel had a legitimate reason not to object. Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33.

Finally, Avalos cannot make the showing of prejudice that is necessary for him to prevail on an ineffective assistance of counsel claim – that but for his counsel's allegedly deficient performance, there is a reasonable probability that the outcome of his trial would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). The State contends that because Officer DeMars's testimony addressed only the purpose of shanks and left it to the jury to decide the nature of Avalos's specific intent when he assaulted Officer Squire, the outcome of the trial would not have been different even if his attorney would have objected to Officer DeMars's testimony.

3) The State is not seeking appeal costs.

Irrespective of whether the State is the substantially prevailing party in this appeal, given Avalos's circumstances, the State is not seeking appeal costs in this case.

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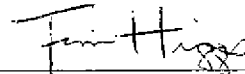
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D. CONCLUSION

For the reasons stated above, the State asks this Court to deny Avalos's appeal and to sustain his conviction and sentence in this case.

DATED: March 28, 2017.

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